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Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons

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UNUSUAL SUSPECTS: RECOGNIZING AND RESPONDING TO FEMALE STAFF PERPETRATORS OF SEXUAL MISCONDUCT IN U.S. PRISONS

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"The vilest deeds like poison weeds
Bloom well in prison-air:
It is only what is good in Man
That wastes and withers there:
Pale Anguish keeps the heavy gate
And the Warder is Despair."[1]

INTRODUCTION

"Boxer X," a male inmate in Smith State Prison in Glennville, Georgia, experienced sexual misconduct at the hands of a female correctional officer.[2] This abuse is similar to that endured by other male inmates throughout the U.S. prison system. Between July and November 2003, the officer repeatedly ordered Boxer to "strip nude and masturbate for her" while she watched through the food tray flap of Boxer's cell door.[3] She sometimes offered favors, such as bringing more hot food, in exchange for a chance to look at Boxer's genitals.[4] On the few occasions in which Boxer refused to participate, the officer threatened and then proceeded to file disciplinary reports against Boxer.[5] In his handwritten complaint to the United States District Court for the Southern District of Georgia, Boxer wrote:

> [T]he defendant was a correctional Officer Sergeant and I was a prisoner. The defendant had the authority and power to write false disciplinary reports against [me] . . . without any problems and get away with it if I refused her sexual advances

1. OSCAR WILDE, *The Ballad of Reading Gaol*, *in* THE COMPLETE WORKS OF OSCAR WILDE 195, 213 (Bobby Fong & Karl Beckson eds., Oxford University Press 2000) (1897).
2. Boxer X v. Harris, 437 F.3d 1107, 1109 (11th Cir. 2006).
3. Complaint at 6, Boxer X v. Harris, No. 603–147 (S.D. Ga. Filed Dec. 8, 2003), *granting implied motion to amend complaint*, No. 603CV147, 2007 WL 1731436 (S.D. Ga. June 4, 2007).
4. *Id.* at 5.
5. *See id.* at 6 (alleging that the defendant falsely charged Boxer with "Insubordination," "Verbally Threatening," "Exposure/Exhibition," and "Failure to Follow Instructions" for refusing to engage in sexual activities with the defendant). Boxer further alleged in his complaint that he was innocent of all the charges, yet due to the fact that he was "denied the right to call witnesses and present evidence," "[t]he right to request to have charging officer (defendant) present," and "appeal forms," he was wrongfully disciplined. *Id.*

> and refuse [sic] to engage in her sexplays. So I was like I had to do it.[6]

Despite the general public's ignorance of this issue of sexual misconduct perpetrated by female prison staff against male inmates, such stories are remarkably familiar to those who study or work in the world of prisons.[7]

The Prison Rape Elimination Act ("PREA") of 2003 mandated that the Bureau of Justice Statistics ("the Bureau") undertake new studies of sexual violence in prisons.[8] Accordingly, the Bureau released a report in July 2006 revealing some groundbreaking data. Of the 344 substantiated allegations of staff-on-inmate sexual violence made in federal, state,

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6. *Id.* at 7. Also, Boxer asserted that the female staff perpetrator was not afraid that her actions would be discovered by other prison officials:

> I asked the defendant what if other officers or staff discover her engaged in such unprofessional activity with me—the defendant stated to me that most of the officers and staff here a[t] Smith State Prison have too much dirt on their own hands to worry about the dirt that she do [sic]—and the defendant stated to me that the thought of getting caught is the thrills [sic] that turned her on the most.

Id. at 7.

7. NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, STAFF PERSPECTIVES: SEXUAL VIOLENCE IN ADULT PRISONS & JAILS 17 (2006) [hereinafter STAFF PERSPECTIVES] (conducting focus group interviews with prison officials regarding their knowledge of prison sexual violence). The interviewees recognized that staff-on-inmate sexual misconduct perpetrated by both male and female staff occurs frequently. *Id.* One respondent charged, "It's not just men—there have been female staff involved, too. There have been more women involved than men." *Id.* at 18. A variety of such staff sexual misconduct perpetrated by female staff against male inmates has been prosecuted in the past year. *E.g.*, *Former Prison Official Faces Charge of Sexual Conduct*, IDAHO STATESMAN, Sept. 15, 2006 (reporting that a female correctional officer at Idaho's maximum security prison was arrested for engaging in sexual conduct with a male inmate). These stories have made headlines in newspapers across the country in past decades as well. *E.g.*, Sean Kelly, *Guards Accused of Sex at Prison: Women Indicted on Federal Counts*, DENVER POST, July 12, 2002, at B-01 (reporting that two female prison staff members, including a former prison manager and a former assistant to the warden, were indicted for having sex with four male inmates); Scott Stephens, *A Story of Bar-Crossed Lovers; Female Ex-Guard Accused of Having Sex With Prisoner*, PLAIN DEALER, Jan. 8, 1993, at 1B (telling the tale of a prison romance between a former female prison official and male inmate that is now the basis for the criminal prosecution of the female official).

8. *E.g.*, ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005, at 1 (2006) [hereinafter BUREAU SEXUAL VIOLENCE] (reporting data from the second year of a "national survey of administrative records on sexual violence in adult and juvenile correctional facilities").

and private prisons[9] in 2005, 67% of the overall victims were male inmates and 62% of the overall perpetrators were female staff.[10] The data contradicts the deeply entrenched perception that, in cross-gender interactions between prison staff and inmates, men are the perpetrators of sexual violence and women are the victims.[11] This gender stereotype has

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9. *See generally* Kenneth Kerle, *Women in the American World of Jails: Inmates and Staff*, 2 MARGINS 41, 41–42 (2002) (explaining the difference between prisons and jails as one relating to the length of the inmates' sentences).

> Prisons typically house inmates that have been convicted and are serving sentences longer than a year [whereas] jail is where a person is brought upon arrest.
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> . . . .
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> . . . Historically, jails housed inmates sentenced up to a year; others went into the state prison system. Due to crowding, many jails now hold sentenced inmates for a much longer time in part to relieve the congestion in the state prison systems.

Id.

10. BUREAU SEXUAL VIOLENCE, *supra* note 8, at 9–10 (honing in on the numbers of staff-on-inmate sexual misconduct incidents in prisons and jails, as well as the characteristics of the perpetrators and victims involved). The Bureau's data is considered more extensive and reliable than correctional facilities' own administrative records. *Id.* at 2. *But see* Podcast: Exposing Sexual Violence Behind Bars: The Implementation of the Prison Rape Elimination Act, held by American University Washington College of Law (Nov. 2, 2006), http://www.wcl.american.edu/podcast/audio/20061102_WCL_PREA.mp3?rd=1 (discounting, to some extent, the Bureau's data regarding female perpetrators and male inmate victims of staff sexual misconduct as a predictable by-product of the fact that men comprise the majority of prison inmates). In the discussion, panelist Brenda Smith, a preeminent scholar on prison rape and also a member of the National Prison Rape Elimination Commission, linked the high numbers of reported female staff perpetrators with the existence of a disproportionately large, heterosexual, male inmate population:

> Those numbers are [] surprising to people who [] don't work in the area, but they're totally predictable for people who do. Because, you know, 93 percent of the U.S. prison population is male. So it would stand to reason that there would be a higher number [of female staff perpetrators of staff sexual misconduct], and also if you assume heterosexuality (assume that, just for the minute), then [] those numbers would be higher. But I think that the other thing, too, when you look at the report, you also see that the [] victimizers of female inmates are much more likely to be male staff.

Id. However, there is some evidence of female staff sexually victimizing female inmates. *E.g.*, Daskalea v. District of Columbia, 227 F.3d 433, 440 (D.C. Cir. 2000) (concerning female inmate "nude dancing" organized by female staff); Newby v. District of Columbia, 59 F. Supp. 2d 35, 35–36 (D.D.C. 1999) (involving female inmate "strip-shows and exotic dancing" organized by female staff).

11. *See* discussion *infra* Part II (describing this gender stereotype and its historical development).

influenced not only the minds of average Americans but has also permeated the legal response to prison rape.[12]

Prison rape is fairly common[13] and can take many forms, including inmate-on-inmate sexual misconduct[14] and staff-on-inmate sexual misconduct,[15] and all the various gender permutations within those two categories. Currently, scholars are debating the nature of sexual misconduct between staff and inmates. Although the Bureau reported that 73.6% of the substantiated incidents of staff sexual misconduct in prisons in 2005 had a "romantic" nature,[16] the majority of scholars[17] and

12. *See* discussion *infra* Part II (locating the gender stereotype at the root of the court system's response to claims invoking the rights of men and women in prison).

13. *See* Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601–15609 (Supp. IV 2004) (publishing findings regarding prison rape in conjunction with the PREA). Congress stated that at least 13% of inmates in the United States had experienced some form of sexual assault while in prison, based on conservative expert estimations. 42 U.S.C. § 15601.

14. BUREAU SEXUAL VIOLENCE, *supra* note 8, at 5 (recounting that there were over 1,900 reported allegations of inmate-on-inmate non-consensual sexual acts and abusive sexual contacts in state, federal, and private prisons and jails in 2005).

15. *Id.* (stating that there were 2,779 reported allegations of staff-on-inmate sexual misconduct and harassment in state, federal, and private prisons in 2005).

16. *Id.* at 9 (listing the "characteristics of substantiated incidents of staff sexual misconduct and harassment" in prisons and jails). The Bureau reported that the remaining 38% of staff sexual misconduct involved sexual harassment, unwanted touching, indecent exposure, pressure / abuse of power, or physical force. *Id.* These percentages add up to more than 100% because multiple responses were allowed for each item in the survey. *Id.*

17. *See, e.g.*, Frank Green, *Prison, Jail Staff Cited in Half of Sex Cases; Data Show That In Va. and U.S., Female Workers Cited in Bulk of Offenses with Prison Inmates*, RICHMOND TIMES-DISPATCH, August 27, 2006, at A-1 ("Meda Chesney-Lind, a criminologist and professor of women's studies at the University of Hawaii . . . believes the word romantic is not appropriate. 'It's about power and abuse. It's not about romance.' "). Along these lines, Brenda Smith, has written:

> In any number of oppressive settings, there have been accounts of the powerless forming emotional bonds with those in power. During the period of U.S. slavery, there were many accounts of male and female slaves bearing children and having long-term relationships with their owners. The same is true for men and women in custody . . . . However, prison authorities cannot be in the position of legitimizing relationships between staff and inmates . . . . There is an inherent imbalance of power that the institution relies upon for its legitimacy. Prisons depend on the fact that correctional staff's interactions with inmates are based on achieving correctional goals—safety, security, discipline, and rehabilitation—rather than on furthering an intimate or personal relationship.

Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 223–24 (2006) [hereinafter Smith, *Rethinking Prison Sex*].

state legislatures[18] argue that inmate consent is not acceptable as a defense to staff-on-inmate sexual misconduct.[19] This position is based on the presumption that the unequal power dynamics inherent in any custodial relationship make it impossible for an inmate to freely consent to a romantic relationship with a staff member.[20]

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18. *See* discussion *infra* Part I.A. (describing the various state statutory laws criminalizing prison rape, as well as their policies on the use of consent as a defense).

19. This Article adopts the majority position by assuming that any sexual contact between a staff member and inmate always constitutes an abuse of authority and therefore can never be considered consensual or "romantic." In light of this Article's presumption of the invalidity of inmate consent, the reader should construe the phrase "staff sexual misconduct" as used throughout this paper broadly to encompass all related concepts, such as "sexual contact," "sexual violence," "sexual abuse," and "prison rape." Each of these phrases is intended to reference the full range of possible sexually coercive (i.e. non-consensual) conduct that can be committed by a prison staff member against an inmate, and all of these terms will be used interchangeably. *See* Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108–79 The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 144 (2006) (defining sexual violence in prison as a "complex continuum").

20. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 4 (Apr. 2005) [hereinafter DETERRING STAFF SEXUAL ABUSE] (presenting the rationale underlying the legal doctrine that inmates cannot consent to sexual acts with staff members). In particular, the report lists three major factors that should invalidate inmate consent:

> First, staff members and inmates are in inherently unequal positions, and inmates do not have the same ability as staff members to consent to a sexual relationship. Second, inmates may try to use sex to compromise staff and obtain contraband or unauthorized privileges, which can compromise the safety and security of the prison. Third, either knowingly or unknowingly, staff members who engage in sex with inmates may be exploiting inmates' vulnerabilities or past sexual abuse.

Id. See also Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 709 (1998). The Stanford Prison Experiment involved placing "[o]therwise emotionally strong college students" in a mock-prison environment. *Id.* The students were randomly assigned to play the role of either prison staff member or inmate, and the experimenters ultimately discovered that, when given authority over another human being, even the most "normal" people can "quickly internalize their . . . role" and take advantage of their power position by abusing those in custody. *Id.* The authors of this article, also the original experimenters, describe the extremely abusive staff-inmate relationships that formed even just a few days into the experiment:

> Many of these seemingly gentle and caring young men [chosen to play the "guard" role], some of whom had described themselves as pacifists or Vietnam War "doves," soon began mistreating their peers and were indifferent to the obvious suffering that their actions produced. Several of them devised sadistically inventive ways to harass and degrade the prisoners, and none of the less actively cruel mock-guards ever intervened or complained about the abuses they witnessed . . . . Our planned two-week experiment had to be aborted after only six days because the experience dramatically

Another source of debate about staff-on-inmate sexual misconduct is the questionable reliability of data on the numbers of inmate victims.[21] Much of the uncertainty in the field stems from the code of silence that pervades prison culture and makes inmate victims hesitant to report sexual misconduct to correctional authorities. This code of silence is shaped by "fear of reprisal from perpetrators, . . . personal embarrassment, and lack of trust in staff."[22] The code of silence can prove even more oppressive to male inmates who have been victimized by female staff due to the pressures of hegemonic masculinity that exist in prisons.[23] In the prison gender order, a male inmate who has been victimized by a female staff member often feels compelled to keep that fact hidden from other inmates and staff members.[24] If the truth were to be

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and painfully transformed most of the participants in ways we did not anticipate, prepare for, or predict.

Id. This experiment demonstrates the complex psychological power struggle rooted in the custodial relationship. In light of such a struggle, any attempts to parse out valid from invalid inmate consent becomes a problematic task.

21. *See* James E. Robertson, *A Clean Heart and Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C.L. REV. 433, 442 (2003) [hereinafter Robertson, *A Clean Heart*] ("Commentators disagree over the number of victims [of prison rape]. Estimates range from one percent of the prison population to as high as twenty-eight percent. In fact, a statistical fog surrounds prison rape . . . .").

22. BUREAU SEXUAL VIOLENCE, *supra* note 8, at 2 (admitting that the code of silence has contributed to some uncertainty regarding the accuracy of inmate reporting); *see* Olga Giller, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN'S L.J. 659, 662 (2004) (depicting the prison code as "a strict system of behavior and order that governs prisoners' daily lives"); STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES: A Shadow Report to the U.N. Committee Against Torture 1, 11 (2006), *available at* http://nicic.org/Library/021522 [hereinafter IN THE SHADOWS] (explaining that the "code of silence" operates to "keep prisoner rape shrouded in secrecy both inside prisons and jails and in society at large" by deterring prisoners from reporting sexual abuse, and thereby acts as a "serious impediment to justice"). In light of the code of silence, the Bureau is currently making efforts to develop new data-gathering methods that will more accurately measure the incidence of sexual violence in correctional facilities. BUREAU SEXUAL VIOLENCE, *supra* note 8, at 2.

23. *See* Don Sabo et al., *Gender and the Politics of Punishment, in* PRISON MASCULINITIES 3, 5 (Don Sabo et al., eds., 2001) [hereinafter Sabo, *Gender and the Politics of Punishment*] (defining hegemonic masculinity as "the prevailing, most lauded, idealized, and valorized form of masculinity," which emphasizes "male dominance, heterosexism, whiteness, violence, and ruthless competition," and asserting that men's prisons in particular are ripe settings for the "expression and reproduction of hegemonic masculinity"). Along these lines, prisons can be understood as "patriarchal institutions," for they demonstrate the "four earmarks" of patriarchy: homosociality, sex segregation, hierarchy, and violence. *Id.* at 7–8.

24. *See* Nancy Levit, *Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity, in* PRISON MASCULINITIES 93, (Don Sabo et al., eds., 2001).

revealed, the inmate would risk losing his masculine image and being perceived as even weaker than a woman, the stereotypical embodiment of vulnerability and submission.[25]

In light of the Bureau's new data, the legal system must re-conceptualize the current image of women in prison to include potential aggressor status.[26] Accordingly, this Article argues for the active prosecution of both female and male staff who engage in sexual misconduct under a new standard that moves beyond the gender stereotype. Part I describes the legal setting surrounding this issue. Part II explores the legal manifestations of the pervasive gender stereotype mentioned above. Part III recommends a new standard to apply in the prosecution of both female and male staff perpetrators, based on lessons learned from the prosecution of women for statutory rape outside of the prison context.

> [J]ust as women feel ashamed and humiliated by [sexual] harassment, men may feel absolutely silenced . . . . Men may fear both that people will not believe their claims and that people *will* believe their claims but will regard them as effeminate. Because society equates being the target of sexual harassment with being something less than male, men may not want to admit that they experienced sexual harassment.

Id. See also Sabo, *Gender and the Politics of Punishment, supra* note 23, at 10–11 ("[T]he following core [code] commandments remain: Even if you do not feel tough enough to cope, act as if you are. Suffer in silence. Never admit you are afraid. Whatever you see 'going down,' whether it is the brewing of pruno (prison-brewed drinking alcohol), rape, or murder, do not get involved and do not say anything . . . . Act hard and avoid any semblance of softness. Do not help the authorities in any way. Do not trust anyone.").

25. *See* Siegmund Fred Fuchs, *Male Sexual Assault: Issues of Arousal and Consent*, 51 CLEV. ST. L. REV. 93, 94–96 (2004) (explaining how society ridicules men who come forward to report assaults performed by women, particularly when the male victim admits to having maintained an erection during his sexual assault, and further arguing that an erection under these circumstances should not be read as indicating consent to engage in sexual activity); Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 385 (2006) (discussing how men are just as constrained as women by gender stereotypes and societal expectations, and as a result they are often unable to recognize themselves as victims of sexual abuse perpetrated by women).

26. Other scholarly articles on the subject of prison rape have directed their efforts instead at redefining the image of men in prison to include potential victim status. *See, e.g.*, Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 222 (1999) (demanding that courts recognize that when men are victims of prison rape, their privacy rights are implicated in a similar way that female inmates' privacy rights are); Giller, *supra* note 22, at 660–64 (arguing that the "ultramasculine world" of prison prohibits any recognition of the rape and victimization of male inmates); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 2–19 (1999) [hereinafter Robertson, *Cruel and Unusual*] (exposing the fact that sexual harassment is commonplace among male inmates and attempting to create profiles of male inmate victims and victimizers).

Finally, this Article concludes by assessing the potential outcomes of applying the new standard.

I. The U.S. Legal Setting Surrounding Staff-On-Inmate Sexual Misconduct

As United States lawmakers on both the state and federal levels recognized the far-ranging, negative effects that staff-on-inmate sexual misconduct has on both the inmate population and society at-large,[27] they developed two new bodies of law: 1) statutory law that both criminalizes and attempts to prevent such misconduct; and 2) case law that enables inmate victims to turn to the federal courts for vindication of their Eighth Amendment right to be free from cruel and unusual punishment. Together, these legislative and judicial approaches create the legal framework for the issue of staff-on-inmate sexual misconduct. As such, they are the parameters within which any legal efforts to respond to the problem of prison rape, including the new standard articulated in Part III, are situated.

A. Statutory Law

1. Criminal Statutes

As of July 2006, all state and federal legislatures had enacted some form of criminal statute prohibiting staff sexual misconduct with inmates.[28] The majority of these statutes penalize uniformly all forms of

27. *See* Dumond, *supra* note 19, at 142–43 (detailing the development of official awareness regarding the problems associated with prison rape). Staff-on-inmate sexual misconduct can have a severe physical and psychological impact on inmate victims and can additionally endanger public health and safety outside of the prison walls. *See* 42 U.S.C. § 15601 (articulating findings that, *inter alia*, prison rape can contribute to the spread of HIV/AIDS both inside and outside of prison, and it can also negatively impact the recidivism rate of inmate victims after release); *see also* Bell et al., *supra* note 26, at 208–11 (detailing the varied negative effects of prison rape, including psychological harms, physical harm, and harms to society); Giller, *supra* note 22, at 687 ("[T]he risks associated with sexual assault in prison . . . extend beyond prison walls. Families, loved ones, and the general public are affected by the debilitating and sometimes dangerous aftermath of prisoner rape.") (internal quotations omitted).

28. *See* Nat'l Inst. of Corr. & Wash. Coll. of Law Project on Addressing Prison Rape, Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody (Dec. 2006), *available at* http://nicic.org/Downloads/PDF/Library/021387.pdf [hereinafter Fifty-State Survey] (providing a chart of the statutes

sexual misconduct, which is understood to encompass "sexual penetration by a body part or an object, regardless of the sex of the parties or what part of the body the penetration occurred, and sexual touching or contact."[29] However, a few state statutes exclude coverage of the more minor forms of sexual contact.[30]

Due to the unequal power dynamic inherent in the custodial relationship, twenty-five states[31] and Congress[32] prohibit the use of consent as a defense to staff sexual misconduct with inmates in their criminal statutes. The penalties imposed on convicted prison staff also vary between the state and federal criminal statutes. Whereas all but three states impose harsh penalties on staff perpetrators by defining some forms of sexual misconduct as felonies,[33] federal law merely defines staff-on-

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passed in every state relating to staff-on-inmate sexual abuse, as well as the potential penalties and defenses for each).

29. NAT'L INST. OF CORR. & WASH. COLL. OF LAW PROJECT ON ADDRESSING PRISON RAPE, STATE LAWS PROHIBITING SEXUAL MISCONDUCT WITH INDIVIDUALS IN CUSTODY: CHECK-LIST (Jan. 2006), *available at* http://nicic.org/Downloads/PDF/Library/021634.pdf [hereinafter CHECK-LIST]; *see, e.g.*, 18 U.S.C.A. §§ 2241–2244 (West Supp. 2006) (creating federal criminal penalties for "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact" between prison staff and inmates); N.Y. PENAL LAW § 130.00 (Consol. 2006) (defining sexual offenses broadly to include sexual intercourse, oral sexual conduct or anal sexual conduct, sexual contact, and forcible compulsion). *See generally* FIFTY-STATE SURVEY, *supra* note 28.

30. *See, e.g.*, IDAHO CODE ANN. § 18-6110 (2006) (defining sexual contact narrowly to include "sexual intercourse, genital-genital, manual-anal, manual-genital, oral-genital, anal-genital or oral-anal, between persons of the same or opposite sex," and to exclude other minor sexual contact). *See generally* CHECK-LIST, *supra* note 29; FIFTY-STATE SURVEY, *supra* note 28.

31. For examples of these states and their criminal statutes, *see* CHECK-LIST, *supra* note 29.

32. *See* 18 U.S.C.A. § 2243(c) (excluding consent from the listed defenses); DETERRING STAFF SEXUAL ABUSE, *supra* note 20, at 4 ("According to federal law, all sexual relations between staff and inmates are considered abuse. Even if a sexual act would have been considered consensual if it occurred outside of a prison, by statute it is criminal sexual abuse when it occurs inside a prison.").

33. These three states are Iowa, Kentucky, and Maryland. *See* IOWA CODE § 709.16(1) (2003) ("An officer . . . of the department of corrections . . . who engages in a sex act with an individual committed to the custody of the department of corrections . . . commits an aggravated misdemeanor."); KY. REV. STAT. ANN. § 510.120(2) (2006) ("Sexual abuse in the second degree is a Class A misdemeanor."); MD. CODE ANN., [Crim. Law] § 3-314(d) (2006) ("A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $3,000 or both."). *See generally* CHECK-LIST, *supra* note 29; FIFTY-STATE SURVEY, *supra* note 28. Furthermore, Arizona, Delaware, and Nevada impose criminal sanctions not only on staff but also on inmates who participate in staff-on-inmate sexual misconduct. *See* ARIZ. REV. STAT. ANN. § 13-1419(B) (2006) ("A prisoner who is in the custody of the state department of corrections . . . commits unlawful sexual conduct by engaging in oral sexual contact, sexual contact or sexual

inmate sexual abuse as a misdemeanor punishable by a maximum sentence of two years,[34] unless force or threat of force is involved, in which case a maximum penalty of life imprisonment can be imposed.[35]

Despite efforts put forth by states and the federal government to criminalize staff sexual misconduct, the legal system habitually fails to enforce these statutes.[36] Along these lines, a report released by the

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intercourse with a person who is employed by the state department of corrections . . . ."); DEL. CODE ANN. tit. 11, § 1259 (2006) ("A person is guilty of sexual relations in a detention facility when, being a person in custody at a detention facility . . . the person engages in sexual intercourse or deviate sexual intercourse on the premises of a detention facility. It shall be no defense that such conduct was consensual. Violation of this section shall be a class G felony."); NEV. REV. STAT. ANN. § 212.187(1) (2003) ("A prisoner who is in lawful custody or confinement . . . and who voluntarily engages in sexual conduct with another person is guilty of a category D felony . . . ."); Smith, *Rethinking Prison Sex*, *supra* note 17, at 220 (charging that these laws punishing inmates for staff sexual misconduct have had "unsurprising" negative effects on the rate of prosecution of staff offenders, as well as on inmate reporting of sexual misconduct).

> The result, at least in Delaware, has been that staff who violate these laws are reassigned while inmates receive both disciplinary and criminal penalties . . . . [T]his has created a situation where inmates are reluctant to report for fear of not being believed and for fear of receiving additional criminal and administrative sanctions.

Id.

34. *See* 18 U.S.C.A. §§ 2243(b), 2244(a)(4) (West Supp. 2006) (limiting the federal penalties for staff-on-inmate sexual contact).

35. *See* 18 U.S.C.A. §§ 2241(a)–(b), 2242, 2244(a)(1)–(a)(2), 2244(a)(5) (West 2000 & Supp. IV 2004) (expanding the federal penalties for staff-on-inmate sexual contact when force or threat of force is used); DETERRING STAFF SEXUAL ABUSE, *supra* note 20, at 8 (detailing the federal law and penalties for staff sexual abuse of inmates while simultaneously emphasizing the importance of "effective prosecution and punishment" in order to deter such misconduct). A huge deficiency remains in the federal law surrounding staff sexual misconduct due to the fact that it only covers sexual misconduct in Bureau of Prison facilities, not contract facilities. *Id.* at 1. This legal gap often allows staff perpetrators in contract facilities to escape prosecution. *Id.*

36. *See* Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 642 (D.D.C. 1994) (recognizing that the D.C. Department of Corrections typically transfers suspected staff offenders to new facilities rather than pursuing prosecution); STAFF PERSPECTIVES, *supra* note 7, at 20 ("The culture in the prosecutor's office about prison rape is where corrections was 20 years ago. The community sees that sexual assault is somehow justified. Who cares about inmates when they have probably hurt somebody themselves?"); Katherine C. Parker, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U. J. GENDER SOC. POL'Y & L. 443, 472 (2002) (acknowledging the "endemic" nature of the lack of prosecution of staff sexual offenders); American Civil Liberties Union, Words from Prison—Did you know . . . ?: The Link Between Incarceration and Violence, http://www.aclu.org/womensrights/violence/25829res20060612.html#II (emphasizing the lack of prosecution of prison staff accused of staff sexual misconduct, and providing as evidence the fact that, in 1997,

Department of Justice Office of the Inspector General (OIG) in April 2005, entitled *Deterring Staff Sexual Abuse of Federal Inmates*, revealed that "the majority" of staff sexual abuse cases studied did not end in prosecution.[37] Similarly, a report released by the National Institute of Corrections in 2000, entitled *Sexual Misconduct in Prisons: Law, Remedies, and Incidence*, described the outcomes of various sexual misconduct investigations of Department of Corrections staff in 1998.[38] The report explained that the most common fate for staff involved in substantiated staff-on-inmate sexual misconduct was to be discharged. The second most common outcome was resignation,[39] while prosecution and discipline were the two least common outcomes.[40] Furthermore, of the staff actually prosecuted by the OIG between 2000 and 2004, the majority, or 73%, received only a sentence of probation, while 15% were sentenced to less than one year of incarceration, and 2% were only required to pay a fine.[41]

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only ten prison employees in the U.S. were disciplined for sexual misconduct); *see also* DETERRING STAFF SEXUAL ABUSE, *supra* note 20, at 10 (attempting to explain this lack of prosecution as the product of insufficiency of evidence, the resignation of the prison staff member prior to prosecution, or the fact that the cases "lack[] jury appeal").

37. DETERRING STAFF SEXUAL ABUSE, *supra* note 20, at 9 (reporting that 45% of the cases prosecuted, 54% were declined for prosecution, 1% were presented for prosecution but had not been decided, and only 40% of the cases prosecuted actually resulted in convictions).

38. *See* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, SEXUAL MISCONDUCT IN PRISONS: LAW, REMEDIES, AND INCIDENCE 10–11 (May 2000), *available at* http://nicic.org/Library/016112 [hereinafter SEXUAL MISCONDUCT IN PRISONS] (assessing various state departments of corrections' systems used to track and respond to staff sexual misconduct allegations).

39. *Id.*

40. *Id.* Despite the seemingly lenient treatment of staff offenders, the report concludes,

> [T]here has been considerable activity in the past 3 years on the part of states and DOCs in attempting to prevent or reduce sexual misconduct involving prison staff and inmates. Changes in agency policy, staff training, and new statutes reflect an increasingly proactive stance toward preventing and responding to staff sexual misconduct.

Id. at 12.

41. *See* DETERRING STAFF SEXUAL ABUSE, *supra* note 20, at 10 (using a graph to visually demonstrate the disparity between the large percentage of staff given probation after being convicted of sexual abuse of inmates and the small percentage of such staff sentenced to incarceration).

2. The Prison Rape Elimination Act of 2003

In addition to passing the federal criminal statute, Congress put extensive effort into preventing and responding to prison sexual violence through the enactment of the PREA on September 4, 2003.[42] The pre-enactment congressional record reveals Congress's intentions "to make prevention and prosecution of sexual assault within correctional facilities a priority for Federal, State and local institutions and [to] require the development of national standards for detection, prevention, reduction, and punishment of these incidents."[43]

In order to achieve these comprehensive goals, the PREA, *inter alia*, calls for the Bureau to gather data regarding the frequency and impact of prison rape, outlines the methods and sampling techniques that the

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42. *See* 42 U.S.C. §§ 15601–15609 (Supp. IV 2004) (making findings about prison rape, creating research bodies to further study prison rape, and mandating the development of national standards to respond to and ultimately eliminate prison rape); Dumond, *supra* note 19, at 142 (likening prison rape to "a wound that had been festering in American corrections" and, accordingly, likening the PREA to "examination and treatment" of the wound); Sarah K. Wake, *Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220, 220–21 (2006) (asserting that the issue of prison rape had "too long been quietly swept under the rug") (internal quotations omitted); AMNESTY INTERNATIONAL, WOMEN IN CUSTODY 15 (2006), *available at* http://www.amnestyusa.org/women/custody/custodyissues.pdf (explaining that the PREA is the first federal law directed at prison rape, and that it applies to all correctional and detention facilities in the U.S.). The PREA was offered to Congress as a "bipartisan effort to address this problem in a meaningful way and bring some accountability into America's prisons and jails." 149 CONG. REC. H7764 (daily ed. July 25, 2003) (statement of Rep. Scott) [hereinafter 149 CONG. REC. H7764].

43. 149 CONG. REC. H7764, *supra* note 42 (exuding praise for the hard work put into the creation and passage of the PREA); *see* 42 U.S.C. § 15602 (enumerating the PREA's nine essential purposes). These purposes include:

> [to] (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; (2) make the prevention of prison rape a top priority in each prison system; (3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape; (4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities; (5) standardize the definitions used for collecting data on the incidence of prison rape; (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; (7) protect the Eighth Amendment rights of Federal, State, and local prisoners; (8) increase the efficiency and effectiveness of Federal expenditures through grant programs . . . ; and (9) reduce the costs that prison rape imposes on interstate commerce.

42 U.S.C. § 15602. *See also* Wake, *supra* note 42, at 237 (articulating that, above all, PREA was intended to spread awareness of prison rape and to take the requisite steps to eradicate it from the American correctional system).

Bureau must use in its study,[44] and further establishes the National Prison Rape Elimination Commission, whose mission is to study the effects of prison rape and eventually issue a report on the study.[45] Through this report, the Commission will assist with the development of the national standards described above, to be released in late 2007 or early 2008.[46] While these new standards will not create any private right to sue, a jail or prison's failure to adhere to the standards may result in decreased federal funding[47] and may also be used as evidence in civil trials to demonstrate that the jail or prison or staff member did not meet the required standard of care to protect the inmate's safety and well-being.[48]

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44. *See* 42 U.S.C. § 15603 (explaining the general objectives, considerations, solicitation of views, sampling techniques, surveys, and reports that must be involved in the Bureau's "annual comprehensive statistical review").

45. 42 U.S.C. §§ 15606(a)–(d).

46. *See* 42 U.S.C. § 15606(d)(3) (mandating that the Commission's report be submitted to the enumerated government officials "no later than 3 years after the date of the initial meeting of the Commission" and that it contain "recommended national standards for reducing prison rape"). The Attorney General will then publish "a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape" within the year after receiving the Commission's report. 42 U.S.C. § 15607(a)(1). The projected submission year for the Commission's report is 2007. *See* STOP PRISONER RAPE, PRISON RAPE ELIMINATION ACT UPDATE (Mar. 2007), *available at* http://www.spr.org/pdf/SPR_PREA_update_3-29.pdf (explaining the committee process by which the standards will be drafted, as well as the dates on which the committees are scheduled to meet and complete the standards).

47. *See* 42 U.S.C. § 15607(c) (listing the requirements for eligibility for federal funds and thereby creating an incentive for prisons and jails to comply with the standards).

48. *See* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT AND LOCAL JAILS: THE FACTS 4 (2006), *available at* http://nicic.org/Downloads/PDF/Library/021455.pdf [hereinafter THE FACTS] (posing and answering frequently asked questions about PREA by local jails, such as "[a]re there currently standards that we must comply with?," "[c]an I be sued for not complying with PREA?," and "[w]hat are the consequences to my jail for not complying with PREA?"). *See generally* David K. Ries, *Duty-To-Protect Claims By Inmates After the Prison Rape Elimination Act*, 13 J. L. & POL'Y 915, 971–90 (2005) (analyzing two pending federal lawsuits in order to demonstrate the potential impact of the PREA on prisoners' rights litigation). The data generated under the PREA will provide inmate claimants with "better records" of the incidence and harms of prison sexual violence, as well as "more effective administrative processes" to report any incidents or threats of harm. *Id.* at 972–73. As a result, deliberate indifference will likely be easier for inmate claimants to prove, and more "meaningful remedies" will be possible under the new standards generated by the PREA. *Id.* at 973.

While the PREA itself applies the traditional definition of rape,[49] it grants the Bureau license to redefine rape in its study.[50] Significantly, the Bureau has chosen to define rape to include a more extensive range of sexual misconduct, including "[n]onconsensual sex acts," "[a]busive sexual contact," "[s]taff sexual misconduct," and "staff sexual harassment."[51] This broader definition has enabled the Bureau to undertake more comprehensive studies, resulting in data that more accurately reflects the multi-faceted nature of prison sexual violence.[52]

The post-enactment reactions to the PREA have been varied, and it is still unclear what impact, if any, the PREA will have on the incidence of prison rape.[53] Nevertheless, without the PREA's mandate to the Bureau to gather data on prison rape, and the Bureau's ensuing report on sexual violence in the correctional system, there would be no official acknowledgement of the high incidence of staff-on-inmate sexual abuse perpetrated by female staff.

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49. *See* 42 U.S.C. § 15609(9). The statute defines rape relatively narrowly as:

> A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will; (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, achieved through the exploitation of the fear or threat of physical violence or bodily injury.

Id.

50. *See* 42 U.S.C. §§ 15603(a)(2)(A)–(D) (giving the Bureau authority to determine how to define rape, collect information, and adjust the data in its study).

51. BUREAU SEXUAL VIOLENCE, *supra* note 8, at 3 (including both "consensual" and "nonconsensual" acts of a sexual nature under its definition of rape, thereby distinguishing its definition from the more narrow, traditional one utilized by the PREA).

52. *But see id.* at 2 (noting that prison rape data is often unreliable due to the psychological pressures in prison and related problems with reporting).

53. For instance, human rights organizations have expressed their concern that the PREA will influence correctional authorities to "strictly enforc[e] existing prison policies that prohibit all sex between inmates and in some instances all sexual expression, including masturbation." Smith, *Rethinking Prison Sex*, *supra* note 17, at 193–94 (arguing that prisoners have a right to sexual self-expression, and that allowing room for this sexual expression would serve certain penological interests). Furthermore, other critics have argued that the PREA is a "superficial gesture of little substance." Wake, *supra* note 42, at 223. On the other hand, some scholars have praised the PREA for finally acknowledging and shedding light on the issue of prison rape. *Id.* at 237.

B. The Federal Courts and Case Law

The federal courts provide another arena in which to hold prison officials liable for sexual harms inflicted on inmates by staff members or other inmates. Specifically, inmate victims can turn to the federal courts for vindication of their Eighth Amendment right to be free from cruel and unusual punishment in the form of rape.[54] They can bring Section 1983 actions against prison officials for not protecting their Eighth Amendment rights in the face of substantial risks of serious harm during their prison term, including sexual assault.[55] Such failure-to-protect cases will then be assessed under the "deliberate indifference" standard, which the Supreme Court articulated in *Farmer v. Brennan* in 1994.[56]

Section 1983, also known as the Civil Rights Act of 1871, creates a direct federal cause of action against those who, "acting under color of" law, deprive litigants of their constitutional or legal rights.[57] Prisoners, in particular, have been able to take advantage of Section 1983 as a means for obtaining damages for violence inflicted by prison officials or other inmates.[58] Prison officials can be held personally liable under Section

54. *See* Robertson, *A Clean Heart, supra* note 21, at 34–36, 50 (explaining the willingness of several federal courts to conclude that inmate fears of prison sexual violence inflict an Eighth Amendment violation). *See, e.g.*, Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984) (holding that the plaintiff inmates' Eighth Amendment protections against cruel and unusual punishment were violated when prison staff acted with deliberate indifference toward the "pervasive risk of harm to the prisoners" generated by frequent inmate-on-inmate sexual attacks in this particular detention center).

55. *See* Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000) (specifying, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law"); Parker, *supra* note 36, at 453–63 (outlining the possible routes that prisoners seeking civil redress for violations of their Eighth Amendment rights can take to obtain federal remedies, and lamenting the detailed and complicated nature of the requirements involved).

56. *See* Farmer v. Brennan, 511 U.S. 825 (1994) (weighing the liability of prison officials for the harm inflicted on a pre-operative transsexual inmate who, upon transfer to a federal penitentiary, was placed in the general male population and then beaten and raped by other inmates); Parker, *supra* note 36, at 454–57 (providing a history of Supreme Court jurisprudence involving the "deliberate indifference" standard, and pointing out that it is a difficult standard to meet because of its subjective nature).

57. 42 U.S.C. § 1983.

58. *See* Bell et al., *supra* note 26, at 214 n.145 (explaining that under Section 1983, punitive damages may be awarded against prison administrators for any constitutional violations of male or female inmates' rights while in custody). *Cf.* Robert G. Doumar, *Prisoner Grievances: Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 21, 36 (1994) (arguing that, in the civil context, the large

1983 for their failure to protect inmates from both official violence (perpetrated by government actors)[59] and private violence (perpetrated by other inmates).[60] Additionally, the "deliberate indifference" standard applied in these cases has two parts: prison staff are liable for deprivations of prisoners' Eighth Amendment rights when 1) the alleged deprivation was one that posed "a substantial risk of serious harm," and 2) the prison official was "subjectively aware of the risk," yet deliberately chose to disregard it.[61]

As a result of such failure-to-protect actions, the courts have imposed affirmative duties on prison staff to protect prisoners from both official and private violence under the Eighth Amendment.[62] However, the federal courts' rulings have been "inconsistent at best" in protecting inmates from sexual violence in prison.[63] This inconsistency is evidenced, on the one hand, by cases in which the courts actively hold prison staff liable under both Section 1983 and the deliberate indifference standard,[64] and, on the other hand, by cases in which the courts

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number of suits brought under Section 1983 in recent years has placed "an ever increasing burden" on the federal courts, and, as a result, the broader impact of these claims "has changed from positive to negative").

59. *See, e.g.*, Riley v. Olk-Long, 282 F.3d 592, 595–97 (8th Cir. 2002) (finding prison officials liable under Section 1983 for knowing about the risk of harm posed by a particular correctional officer and failing to protect a female inmate from that risk and ensuing sexual assault).

60. *See, e.g.*, Martin v. White, 742 F.2d 469, 475–76 (8th Cir. 1984) (holding prison officials liable under Section 1983 for "fail[ing] to reasonably respond to the risks of inmate assaults"). *But see* Doe v. Bowles, 254 F.3d 617, 622 (6th Cir. 2001) (dismissing the inmate's Section 1983 case against prison officials on the basis that "there are genuine issues of material fact which preclude review of this claim"); Langston v. Peters, 100 F.3d 1235, 1238–41 (7th Cir. 1996) (determining that prison officials did not violate the plaintiff inmate's Eighth Amendment rights, and were therefore not liable under Section 1983, due to their lack of knowledge of the risk of harm posed by the plaintiff's cellmate and the lack of detrimental effect caused by their delay in obtaining medical treatment for the plaintiff). The court justified its decision by stating: "[e]very injury suffered by one prisoner at the hands of another does not constitute a violation of the Eighth Amendment prohibition of 'cruel and unusual punishment.'" *Langston*, 100 F.3d at 1237.

61. *Farmer*, 511 U.S. at 828–29; *see* Robertson, *A Clean Heart*, *supra* note 21, at 25 (labeling the *Farmer* decision as one that "speak[s] to the duty of prison staff to safeguard inmates from one another").

62. *See* Parker, *supra* note 36, at 453 (rationalizing that this affirmative duty to protect prisoners' safety and welfare stems from the fact that the state has elected to take prisoners into custody and holds them there against their will).

63. Smith, *Rethinking Prison Sex*, *supra* note 17, at 221–22.

64. *See, e.g.*, Ware v. Jackson County, 150 F.3d 873, 875–76, 883–85 (8th Cir. 1998) (awarding damages to plaintiff inmate under Section 1983 for prison employees' deliberate indifference to the substantial risk of harm posed to female inmates by male

display a high level of deference to prison staff and accordingly grant them immunity or absolve them of liability.[65]

II. The Gender Stereotype Regarding Men, Women, and Sexual Violence in the Prison System

A gender stereotype regarding men and women in the prison system pervades the legal response to prison rape: in cross-gender interactions between prison staff and inmates, men are the sexual predators and women are the vulnerable or passive victims.[66] This gender stereotype prevents the legal system from acknowledging the problem of staff-on-inmate sexual violence perpetrated by female staff against male inmates, as revealed by the Bureau's report. Lawmakers must explore and understand the underlying gender stereotype, including its historical

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prison staff in this particular correctional facility, and their resulting failure to protect plaintiff from staff-on-inmate sexual misconduct).

65. *See, e.g.*, Ice v. Dixon, No. 4:03CV2281, 2005 U.S. Dist. LEXIS 13429, at *15 (N.D. Ohio July 6, 2005) (granting prison officials' motions for summary judgment because plaintiff failed to show "that the municipal entity formally adopted or promulgated a policy allowing deputy sheriffs to engage in sexual assault or contact with female inmates"). *See* Giller, *supra* note 22, at 687 (asserting that the deliberate indifference standard is a legal fiction that operates to "keep prison officials free from liability"); Smith, *Rethinking Prison Sex*, *supra* note 17, at 221–22 (alleging that this inconsistency is due in large part to the immunity granted to states, municipalities, and public officials who have taken even the smallest steps in "enact[ing] policies and procedures, conduct[ing] staff training, and [taking] disciplinary action after the fact against staff or inmate perpetrators"). Even the *Farmer* decision itself demonstrated extreme deference toward prison staff, stating, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm was not ultimately averted." *Farmer*, 511 U.S. at 844.

66. *See* Fuchs, *supra* note 25, at 94 (describing society's perception of sexual victimization that "only women are sexually assaulted," and claiming that "society is reluctant to accept the idea that a 'real man' could be reduced to such a sexually passive role"); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1302 (1991) (considering society's normalization of male-on-female sexual aggression, and explaining that "[i]n traditional gender roles, male sexuality embodies the role of aggressor, female sexuality the role of victim, and some degree of force is romanticized as acceptable."). *See also* Levit, *supra* note 24, at 94 (assessing how the law can "reinscribe stereotypes of male aggression" and female passivity). One example of this can be found in rape laws: "social acceptance of male aggression may be reinforced by rape laws that presume a woman's consent to intercourse in the absence of her resistance." *Id. Cf.* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 405 (1984) (emphasizing the "sexual stereotype of men as aggressors and women as passive victims" that lies at the root of some statutory rape laws).

development, in order to overcome it and replace it with a more accurate conception of men and women's roles in prison as reflected in the drafting of future legislation.

A. Historical Shifts in Thinking Giving Rise to the Gender Stereotype

Prison sexual violence has historically been considered a male inmate-on-inmate issue. This viewpoint is commonly reflected in jokes, popular media portrayals of the prison setting,[67] and scholarly writing on the subject from the 1980s and 1990s.[68] The male inmate-on-inmate focus stems from the traditional perception of prison as an environment dominated by patriarchy and hierarchy, in which an "inter-male dominance . . . system" allows some men to take control while others submit both socially and sexually.[69] Within this perceived system, the dominant

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67. *See* Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 563 (2006). Sigler relates two socially acceptable prison rape jokes, one told by California Attorney General Bill Lockyer at a press conference regarding former Enron Chairman Kenneth Lay, and one depicted in a soft drink television commercial:

> Bill Lockyer joked that he would 'love to personally escort Lay to an eight-by-ten cell that he could share with a tattooed dude who says, "Hi, my name is Spike, honey.'" . . . Meanwhile, a recent advertising campaign for a popular soft drink features the company's pitch man, the comedian Godfrey, distributing cans of soda in prison. When he drops a can, he starts to bend over to pick it up, but quickly stops himself, saying, 'I'm not picking that up.' The commercial ends with Godfrey seated in a cell next to a large, tattooed inmate whose arm is draped around him. When Godfrey delivers the company's tag line—'When you drink 7UP, everyone is your friend'—the inmate tightens his hold, to Godfrey's obvious discomfort.

Id. See generally Helen Eigenberg & Agnes Baro, *If You Drop the Soap in the Shower You Are On Your Own: Images of Male Rape in Selected Prison Movies*, 7 SEXUALITY & CULTURE 56 (2003) (considering the accuracy of portrayals of male rape in fifteen drama and action films about male prisons).

68. *See* DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 1 (1980) (treating the study of prison sexual aggression as a study of male, homosexual behavior); MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 37 (1997) (analyzing prison rape simply as a product of the power struggle between male inmates).

69. *See* Giller, *supra* note 22, at 660–62 (contending that the hierarchy and patriarchy at work in the prison system act as "tool[s] of social control and punishment"); Sabo, *supra* note 23, at 6, 11 (arguing that hegemonic masculinity is perpetuated in prisons through expressions of sexuality involving domination and subordination). "The act of prison rape is clearly tied to the constitution of intermale dominance hierarchies. Rapes between male prisoners are often described as if they occurred between men and women in terms of master and slave." *Id.* at 11.

men are thought to play a masculine role while the submissive men play a more feminine role.[70]

While prison sexual violence continues to be a problem among male inmates, an explosion in the number of female inmates in U.S. prisons in the early 1990s[71] brought a shift in both popular and scholarly thinking about the extent of prison sexual violence and the identity of its victims. A series of cases decided in the 1990s was essential in exposing the full extent of sexual abuse of female inmates at the hands of male staff.[72]

In particular, *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*[73] played a key role in spreading such awareness. This case, brought in 1993 in the United States District Court for the District of the Columbia, determined that the extensive sexual assaults perpetrated by male prison staff against female inmates in the D.C. correctional system violated their Eighth Amendment rights.[74] In addition, *Nunn v. Michigan Department of Corrections*,[75] initially brought in the United States District Court for the Eastern District of Michigan in 1996 and ultimately settled in 1999, was also significant because it uncovered rampant sexual violence, threats, and privacy viola-

70. *See* LOCKWOOD, *supra* note 68, at 124–25 (explaining that male aggressors, who typically come from heterosexual backgrounds, view themselves as ultra-masculine and their male victims as "desirable females"). "By any definition relative to self-concept, the prison sexual aggressor is heterosexual. He prefers women, placing men in female roles." *Id.* at 125.

71. *See* TRACY L. SNELL & DANIELLE C. MORTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: WOMEN IN PRISON, SURVEY OF STATE PRISON INMATES, 1991 (1991) (calculating that while the general State prison population grew 58% between 1986 and 1991, the number of women in State prisons grew 75% from yearend 1986 to yearend 1992, and reporting that at that time, women were 5.2% of all prisoners, up from 4.7% in 1986).

72. *See Chapter 13: Sexual Abuse of Women in Prison, A Thematic Case Study, in* THE FORD FOUNDATION, CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES 98 (2004), *available at* http://www.fordfound.org/publications/recent_articles/docs/close_to_home/toc_intro.pdf [hereinafter HUMAN RIGHTS WORK] (noting that these ultimately formative cases were originally brought with much more small-scale, immediate goals in mind).

73. 877 F. Supp. 634, 666 (D.D.C. 1994) (holding the defendants liable for their deliberate indifference to the sexual harm perpetrated against the female inmate plaintiffs).

74. *Women Prisoners of D.C.*, 877 F. Supp. at 665 ("The evidence revealed a level of sexual harassment which is so malicious that it violates contemporary standards of decency . . . . Rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'").

75. No. 96-CV-71416, 1997 U.S. Dist. LEXIS 22970, at *3 (E.D. Mich. Feb. 4, 1997) (granting in part and denying in part defendants' motion to dismiss, thereby allowing plaintiffs to proceed with discovery and pursuit of administrative remedies).

tions being perpetrated by male staff against female inmates in the Michigan Department of Corrections.[76] Not only did these cases draw attention to the problems specifically facing female inmates, but they also played a role in establishing recognition of the widespread occurrence of staff sexual misconduct in the correctional system.[77]

In 1996, Human Rights Watch issued a report, *All Too Familiar: The Sexual Abuse of Women in U.S. State Prisons*, based on the findings of an investigation into the staff-on-inmate sexual abuse of women in prison.[78] The report received extensive press coverage and produced much-needed visibility for the issue.[79] Over the next few years, Amnesty International issued three additional reports: *Rights For All* in 1998, *Not Part of My Sentence* in 1999, and *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women* in 2001.[80] The attention generated by these reports brought about a "women-in-prison movement" that could be felt across the country and abroad.[81] While this new

76. *Nunn*, 1997 U.S. Dist. LEXIS 22970 at *3. *See* HUMAN RIGHTS WORK, *supra* note 72, at 98 (describing case law as one target for human rights activists concerned with the treatment of women in prison to direct their efforts toward, and further describing the outcomes of some such strategically brought cases).

77. *See* Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 236 (2003) [hereinafter Smith, *Watching You*] (arguing that as a result of such cases, the public became more willing to accept that staff-on-inmate sexual abuses actually occur).

78. *See* HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: THE SEXUAL ABUSE OF WOMEN IN U.S. PRISONS (1996), *available at* http://hrw.org/reports/1996/Us1.htm [hereinafter ALL TOO FAMILIAR] (reflecting on data collected from March 1994 to November 1996 regarding the sexual abuse of female inmates by male prison staff in eleven state prisons in the United States).

79. *See* HUMAN RIGHTS WORK, *supra* note 72, at 100 (examining the historical development of awareness about the plight of women in prison, as driven by the reports published by Human Rights Watch and Amnesty International).

80. AMNESTY INTERNATIONAL, RIGHTS FOR ALL (1998), *available at* http://www.rightsforall.amnesty.org/info/report/index.htm (exposing the human rights violations that occur in the United States, particularly those abuses that transpire within the correctional system); AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), *available at* http://www.amnestyusa.org/us/document.do?id=D1F037D8618F4F6D8025690000692F87 (providing profiles of women in prison in the United States and the human rights abuses they experience, as well as recommendations for how to incorporate international standards into the correctional system to eliminate these abuses); AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001), *available at* http://www.amnestyusa.org/women/custody/ (delineating the scope of abuse of women in U.S. prisons and the legal framework surrounding custodial sexual misconduct).

81. *See* HUMAN RIGHTS WORK, *supra* note 72, at 102 (referencing the headlines of some newspaper articles published at the height of this movement to demonstrate the

emphasis on the plight of women in prison helped to increase awareness of the issue and make more extensive remedies available,[82] it also fostered the gender stereotype that women in prisons are typically victims to male aggression.

Today, the growing presence of female correctional staff in men's prisons,[83] and the surfacing threat they pose,[84] necessitates another shift

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popular sentiment around this issue). *See, e.g.*, Elizabeth Olson, *U.N. Panel Is Told of Rights Violations in U.S. Women's Prisons*, N.Y. TIMES, March 31, 1999, at A16.

82. *See* HUMAN RIGHTS WORK, *supra* note 72, at 102 (referencing the positive outcomes of the women-in-prison movement, and explaining that, above all, the most important outcome was the shared human rights vision and connection that activists were able to generate internationally: "This more expansive intellectual framework allowed activists to come together in a steady, if not always easy, collaboration that they maintain to this day.").

83. *See* Mary Ann Farkas & Kathryn R.L. Rand, *Female Correctional Officers and Prisoner Privacy*, 80 MARQ. L. REV. 995, 1027 (1997) ("Women clearly have obtained the right to work in men's prison. Prior to 1972, virtually no women worked as correctional officers in male prisons; today women supervise male inmates in every state and federal prison, as well as in most county institutions."); Richard Tewksbury & Sue Carter Collins, *Aggression Levels Among Correctional Officers: Reassessing Sex Differences*, 86 PRISON J. 327, 328 (2006) (addressing the trend since 1992 of allowing women to work in high-security-level institutions). Today, women constitute one-third of the correctional staff in the U.S. *Id. See also* Kerle, *supra* note 8, at 55–56 (contending that the number of women working in U.S. jails is on the rise: "In 1998, females working as correctional officers in local jails stood at 22.6 percent. By 1993, the figure increased to 24.2 percent. By 1999, the percentage of female jail officers reached 28 percent. The slow, incremental growth continues.").

84. *See* BUREAU SEXUAL VIOLENCE, *supra* note 8 (presenting the Bureau's recently released data regarding the high percentage of female staff perpetrators of sexual misconduct in prisons). In addition to the data released in the Bureau's report, newspapers are also beginning to acknowledge the threat that female prison staff pose to male inmates. *See, e.g.*, Green, *supra* note 17 (referencing the Bureau's recently released data and declaring that those statistics indeed apply to Virginia, where three out of four substantiated incidents of staff sexual misconduct involved a female staff perpetrator); Jerry Seper, *Sex Abuse: 'A Significant Problem' in Prisons*, WASH. TIMES, May 4, 2005, at A06 (acknowledging that "one misconception about the sexual abuse of inmates is that it only involves male staff and female inmates" and recognizing that "the scope of the problem includes female staff with male inmates"). Furthermore, the abuse of prisoners by female staff members was recognized on an international level with the publication of photographs of Private First Class Lynndie England abusing male prisoners at Abu Ghraib prison in 2003. *See* IN THE SHADOWS, *supra* note 22, at 3 (pointing out sarcastically that the sexual abuse and humiliation of Iraqi prisoners at Abu Ghraib was not, as then Secretary of Defense Donald Rumsfeld put it, "fundamentally un-American," in light of the extensive sexual abuse perpetrated on a daily basis in detention facilities on U.S. soil); Ellen Goodman, Op-Ed, *The Downside of Equality*, BOSTON GLOBE, Sept. 30, 2005, at A21 ("These photos [of Lynndie England] not only shattered the image of Americans in Iraq. They were gender-bending to the breaking point. A country barely used to the idea of women in

in thinking. This shift must acknowledge the existence of female staff perpetrators and male inmate victims so that a more sensitive response to prison sexual violence can be developed. If male victimization is not acknowledged, the prison code of silence described earlier[85] may be inadvertently perpetuated. Consequently, these male victims may be abandoned by the legal system.[86]

B. Manifestations of the Gender Stereotype in the Court System

The popularized focus on sexual misconduct between male staff and female inmates in the 1990s, as described above, inspired debates about the advantages and disadvantages of same- and cross-gender supervision in corrections.[87] Since that time, inmates and staff alike have brought many challenges to prisons' cross-gender supervision policies.[88] The courts' responses to these challenges indicate a clear manifestation of the gender stereotype in the legal system.[89] On the one hand, the courts often take a protectionist approach to women's claims, regardless of the claimant's inmate or staff status, whereas, on the other hand, the courts are not usually as sympathetic to men's claims.[90] Thus, at the

war was suddenly confronted with the portrait of a woman as an equal-opportunity abuser.").

85. *See supra* Introduction (describing the causes and effects of the prison code of silence on the general inmate population and more specifically on male inmates who have been victimized by female staff).

86. *See* Levit, *supra* note 24, at 93 (explaining a dilemma that arises from studying the victimization of men—on the one hand, such a study acknowledges male victimization so that "forms of oppression [do not] go unchecked," but, on the other hand, such a study "may [also] promote passivity, helplessness, and blaming behavior on the part of victims"). The only way to avoid this dilemma is to "learn to examine gender role stereotypes as evidential facts rather than mere opportunities for blame." *Id.* at 93. Above all, one must avoid perpetuating denial of the issue: "Treating a problem as nonexistent helps keep it that way." *Id.* at 98. *Cf.* Levine, *supra* note 25, at 359 (recognizing that scholars of statutory rape must "notice female sexual exploitation of male minors" or risk "abandon[ing] an entire class of victims who deserve better").

87. *See* Smith, *Watching You*, *supra* note 77, at 246 (labeling the issue of same-sex supervision as a true "corrections policy" concern at the end of the 20th century).

88. *See, e.g.*, Grummett v. Rushen, 779 F.2d 491, 492–93, 496 (9th Cir. 1985) (upholding the practice of allowing cross-gender prison officials to view male inmates while they are nude because the prison's interest in maintaining security outweighs the inmates' interest in privacy).

89. *See* Smith, *Watching You*, *supra* note 77, at 247–48 ("The outcome of these challenges has depended in large part on three factors: (1) the gender of the inmate; (2) the gender of the staff person; and (3) the nature of the intrusion involved.").

90. *See* Levit, *supra* note 24, at 97 (highlighting the greater privacy rights granted to women in custody than men in custody due to the courts' assumptions that "[m]ale prisoners have diminished expectations of privacy relative to similarly situated women

heart of the courts' responses in cross-gender supervision cases is the belief that typically women in prison are either victims or innocuous members of the prison community and men are aggressors.[91]

These challenges are raised in one of four ways. On the inmate level, male prisoners challenge their supervision by female staff[92] and female prisoners challenge their supervision by male staff.[93] On the staff level, male staff challenge their exclusion from positions in women's correctional institutions[94] and female staff challenge policies that limit their placement in men's correctional institutions.[95]

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prisoners" and that "men are invulnerable, autonomous, and they can build their own walls," unlike women); Bell et al., *supra* note 26, at 222 (raising concerns about the "gender stratification of current judicial rulings on this issue," in which courts are more willing to recognize the privacy rights of female inmates than male inmates); Farkas & Rand, *supra* note 83, at 1024 (drawing attention to the courts' application of "gender specific" standards in evaluating sexuality and abuse in prisons); Karoline E. Jackson, *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review*, 73 IND. L.J. 959, 961 (1998) (alluding to the greater difficulties male inmates have in establishing privacy claims than female inmates).

91. *See* Smith, *Watching You*, *supra* note 77, at 276–78 (acknowledging that even female prison officials, who have a position of authority over male inmates, are seen by the courts as vulnerable to men in custody). "It may be that courts believe that even in the prison context, where female staff wear the superficial vestiges of power and control, they are still less powerful than men, even imprisoned men." *Id.* at 277.

92. *See, e.g.*, Johnson v. Phelan, 69 F.3d 144, 145, 147, 150–51 (7th Cir. 1995) (rejecting plaintiff inmate's argument that cross-gender supervision over naked inmates in the cells, showers, and toilet areas violated his Fourth and Eighth Amendment rights on the basis that such surveillance is not unreasonable nor does it inflict unnecessary injury); Timm v. Gunter, 917 F.2d 1093, 1097, 1103 (8th Cir. 1990) (denying relief to male inmates under Section 1983 for alleged right to privacy and equal protection violations during routine cross-gender pat down searches and surveillance).

93. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1522, 1531 (9th Cir. 1993) (finding in favor of a class of female inmates for a policy requiring "male guards to conduct random, non-emergency, suspicionless clothed body searches on female prisoners" in violation of the inmates' Eighth Amendment rights); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) (affirming the lower court's verdict in favor of plaintiff on her privacy violation claim regarding male staff who assisted in forcefully removing her underclothes).

94. *See, e.g.*, Tharp v. Iowa Dep't of Corr., 68 F.3d 223, 224 (8th Cir. 1995) (rejecting plaintiff male staff members' arguments that the prison's gender-based shift assignment policy discriminated against them on the basis of sex in violation of Title VII of the Civil Rights Act of 1964); Torres v. Wis. Dep't of Health & Soc. Serv., 859 F.2d 1523, 1524 (7th Cir. 1988) (finding in favor of plaintiff male staff because defendants failed to articulate a valid bona fide occupational qualification (BFOQ) defense for their discriminatory policy of employing only female staff in certain units).

95. *See, e.g.*, Reidt v. County of Trempealeau, 975 F.2d 1336, 1337, 1341 (7th Cir. 1992) (dismissing plaintiff staff member's claim that she was denied promotion to a traditionally male-only jailer position because of her sex); Hardin v. Stynchcomb, 691 F.2d 1364, 1369–70, 1374 (11th Cir. 1982) (striking down a jail's policy of dis-

1. Inmates' Challenges to Cross-Gender Supervision

Inmates can raise challenges to cross-gender supervision policies pursuant to Section 1983, as described earlier.[96] Under this rubric, they often argue that cross-gender supervision violates their privacy rights under the Fourth Amendment and their right to be free from cruel and unusual punishment under the Eighth Amendment.[97] The courts have shown repeatedly that they are more willing to entertain the Eighth Amendment claims of female claimants than male claimants.[98] When and if courts do grant relief to men in this context, which is a rare event, the courts typically only do so under the Fourth Amendment.[99] These divergent outcomes stem from the courts' perception that cross-gender supervision affects men and women differently, and consequently "[a]cts permitted when female staff supervise male inmates are not permitted when male staff supervise female inmates."[100] Therefore, at the crux of

criminating against female jailers by barring them from working with male inmates on the basis of the jail's failure to articulate a valid BFOQ defense).

96. *See supra* Part I.B. (clarifying the uses for Section 1983 in prisoners' rights litigation).

97. *See generally* Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291 (1999–2000) (analyzing a variety of cross-gender supervision claims in light of the "sexualization of power" through sexual violence inherent in cross-gender searches).

98. *See, e.g.*, *Jordan*, 986 F.2d at 1531 (deciding the case on Eighth Amendment grounds and intentionally excluding consideration of any other constitutional claims); Coleman v. Vasquez, 142 F. Supp. 2d 226, 234 (D. Conn. 2001) (expressing a willingness to consider plaintiff's Eighth Amendment claims "to the extent the searches are alleged to have caused extreme emotional distress due to her circumstances as a sexually traumatized woman").

99. *See, e.g.*, Haynes v. Marriott, 70 F.3d 1144, 1147–48 (10th Cir. 1996) (finding that a body cavity search performed on a male inmate in front of many female staff members could constitute a Fourth Amendment violation); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing that a male prisoner retains a constitutional right to bodily privacy that may be violated by female staff supervision while the inmate is in the shower or using the toilet); *see* Farkas & Rand, *supra* note 83, at 1014 (describing the Eighth Amendment burden as much more "onerous" for male claimants to carry in cross-gender supervision cases than the Fourth Amendment burden). *But see* Oliver v. Scott, 276 F.3d 736, 744 (5th Cir. 2002) ("Prisoners retain, at best, a very minimal Fourth Amendment interest in privacy after incarceration").

100. Smith, *Watching You*, *supra* note 77, at 278. One scholar has argued that the courts' reliance on such stereotypes can often become a self-fulfilling prophesy:

> In accepting this duality of aggression and vulnerability, judges are not just rationalizing outcomes they can feel comfortable with on the basis of presumed traits. They are actually constructing a reality within prisons. They are ultimately writing rules around the fact that 'boys will be boys' rather than facilitating a culture of change within prisons that requires male guards to conduct themselves professionally.

the courts' disparate responses to men and women's claims is the gender stereotype described earlier.

Generally speaking, in order to grant an Eighth Amendment claim, the court must believe that the claimant is particularly vulnerable to pain.[101] Women have most likely had more success with such claims because the legal system continues to perceive women as the only potential victims.[102] Furthermore, "[c]ourts obviously do not credit the view that men can experience trauma, threat, or embarrassment from the routine viewing and touching of their bodies by female staff in the same way that women inmates would experience that same conduct by male staff."[103] On the other hand, in order to grant a Fourth Amendment claim, the court must believe that a claimant's privacy and dignity has been violated.[104] Men have most likely had more success with such claims because, by taking such a route, the courts can affirm male inmates' dignity and invulnerability, in line with the gender stereotype of men in prison.[105] The courts' vulnerability/dignity dualism encourages male and female claimants to shape their claims along these more gendered lines in order to be successful.[106] As a result, the courts "deny

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Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping A Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 871 (2001).

101. *See* Jackson, *supra* note 90, at 983 (pointing out that in order to establish that an Eighth Amendment violation has occurred, prisoners must demonstrate "(1) that pain was inflicted and (2) that the infliction was unnecessary and wanton") (internal quotations omitted).

102. *See* Bell et al., *supra* note 26, at 216 ("[T]he notion that only women can be victims . . . continues to pervade the legal culture."); Smith, *Watching You*, *supra* note 77, at 279 (arguing that "[m]en have been socialized to detach from vulnerability," whereas "women have been socialized to embrace and identify with it"); *see also* Jackson, *supra* note 90, at 983 ("[I]t has been easier for female inmates to establish 'infliction of pain' based on expert testimony concerning the debilitating and dehumanizing effect that cross-gender search policies have on female inmates . . . .").

103. Smith, *Watching You*, *supra* note 77, at 277; *see* Miller, *supra* note 100, at 864 ("[T]he sexual vulnerability of male inmates is rarely acknowledged . . . .").

104. *See* Jackson, *supra* note 90, at 981 (describing the Fourth Amendment as a protection of one's "self-respect and personal dignity"); *see also* Smith, *Watching You*, *supra* note 77, at 278 (explaining that in Fourth Amendment challenges to cross-gender supervision, "[men] have spoken of supervision by women as humiliating and embarrassing, apparently finding it less acceptable to be under the control of a woman than a man").

105. *See* Smith, *Watching You*, *supra* note 77, at 277 (questioning the motivation behind the courts' typical "dignity" response to male claimants in cross-gender supervision cases). Smith ponders whether the courts' underlying perception that inmates do not experience vulnerability when they are naked is "solely because they are men" or because of their powerful and dangerous criminal identities. *Id.*

106. *See id.* at 278 (explaining that the reality of the litigation process is that "advocates frame their appeals and tell their clients' stories in ways that courts can recognize and

agency" to male and female claimants to frame their grievances in individualized ways,[107] and thereby reinforce the gender stereotype.

2. Staff Members' Challenges to Same-Sex Supervision

Male and female prison staff can bring claims pursuant to Title VII of the Civil Rights Act of 1964 alleging sex-based employment discrimination against institutions that only hire staff of the same sex as the inmates.[108] Incorporated into Title VII is the "bona fide occupational qualification" (BFOQ) defense found in Section 2000e-2(e)(1), which allows employers to discriminate in hiring if doing so is "reasonably necessary" to normal functioning of their business.[109] Two employment discrimination cases in particular provide clear examples of the ways that courts' rationales and uses of language foster the gender stereotype in this context.

Dothard v. Rawlinson is the only case to have reached the Supreme Court challenging sex discrimination in the hiring of female prison

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hear," namely an approach that reinforces traditional constructions of femininity and masculinity). As a result, male and female inmates tend to shape their cross-gender supervision challenges differently:

> There is a qualitative difference in the kinds of claims men and women have made challenging cross-gender supervision. Men have raised claims challenging cross-gender supervision as a violation of their privacy and dignity . . . . On the other hand, women challenge cross-gender supervision as a practice that is damaging and destructive, exacerbating existing and past trauma experienced as children and adults.

Id.

107. *Id.* at 279.

108. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000) (specifying in relevant part: "It shall be unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"); *see also* Farkas & Rand, *supra* note 83, at 995–96 (providing a history of the passage of Title VII in 1964 and its amendments in 1972, as well as the elements required to win a sex discrimination claim pursuant to Title VII); Iman R. Soliman, *Male Officers in Women's Prisons: The Need for Segregation of Officers in Certain Positions*, 10 TEX. J. WOMEN & L. 45, 46–48 (2000) (describing the historical development of sex discrimination case law under Title VII, and throughout the article providing a detailed analysis of various usages of the BFOQ defense).

109. 42 U.S.C. § 2000e-2(e)(1) (2000). *See also* Soliman, *supra* note 108, at 50, 52–53 (presenting examples of cases in which the BFOQ defense has been successfully argued). Such cases include those in which third-party safety concerns have a direct impact on an employee's job performance and those in which the privacy rights of individuals are implicated. *Id.*

staff.[110] Dianne Rawlinson claimed that she was unlawfully discriminated against on the basis of sex when she was denied employment as a staff member in an Alabama prison.[111] Using Title VII, she challenged an Alabama statute mandating specific minimum height and weight requirements for employment as a prison official, as well as an Alabama regulation prohibiting the hiring of female staff for positions requiring close contact with inmates.[112] Although the Court struck down the statute containing height and weight requirements,[113] it upheld the regulation barring the hiring of female staff for close contact positions as lawful under the BFOQ defense.[114]

In *Dothard*, the Court reasoned that this particular Alabama prison environment demonstrated "rampant violence and a jungle atmosphere," in which there was a great "likelihood that inmates would assault a woman because she was a woman."[115] Moreover, the Court reasoned that the staff member's "very womanhood" would hinder her ability to maintain security in the correctional facility.[116] Although the Court acknowledged that Congress's original purpose in enacting Title VII was to allow women to make their own choices about whether they would be comfortable working in a certain setting or position,[117] the Court went on to assert that women's choices were irrelevant to this case.

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110. Dothard v. Rawlinson, 433 U.S. 321 (1977). *See also* Farkas & Rand, *supra* note 83, at 997 (considering the fact that the ruling of the *Dothard* case "threatened to subvert the progress [that had been] made by women" in past Title VII prison employment cases).
111. *Dothard*, 433 U.S. at 323.
112. *Dothard*, 433 U.S. at 322–26.
113. *Dothard*, 433 U.S. at 332.
114. *Dothard*, 433 U.S. at 336–37.
115. *Dothard*, 433 U.S. at 334, 336 (internal quotations omitted). *But see* Griffin v. Mich. Dep't of Corrs., 654 F. Supp. 690, 700–01 (E.D. Mich. 1982) (distinguishing itself from *Dothard* on the basis that *Dothard* was limited to the extremely "inhospitable" conditions of one particular Alabama prison, and the Michigan prison at issue here is not characterized by the same type of horrible environment) (internal quotations omitted).
116. *Dothard*, 433 U.S. at 336.
117. *Dothard*, 433 U.S. at 335. *See also* Farkas & Rand, *supra* note 83, at 995 (explaining that the passage of Title VII acted as the "major impetus" that led to the integration of staff in prisons). Historically, women were not hired in male prisons because of paternalism and safety concerns. *Id.* The enactment of Title VII was intended to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griffin*, 654 F. Supp. at 700 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

> More is at stake . . . [here], however, than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum-security male prison. The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood.[118]

This language directly equates victim status with womanhood, and thereby exemplifies the ingrained nature of the gender stereotype in the Court's perception of female staff.[119] The corollary to the Court's rationale is that men in prison have uncontrollable sexual appetites. Thus, the majority's language also indirectly equates aggressor status with manhood.

Another case presented the reverse scenario. In *Everson v. Michigan Department of Corrections*, a group of male and female prison staff sued the Michigan Department of Corrections (MDOC) under Title VII, alleging that the MDOC's policy barring males from employment in certain positions in its female prisons unlawfully discriminated on the basis of sex.[120] Similar to the *Dothard* decision, the Sixth Circuit held that the MDOC's policy was lawful under the BFOQ defense.[121]

Applying the same rationale as in *Dothard*, the *Everson* court directly equated aggressor status with manhood and indirectly equated victim status with womanhood.[122] This holding further illustrates the pervasiveness of the gender stereotype in the legal culture. Drawing specifically on the rationale and language in *Dothard*, and modifying it to apply to reversed facts, the court reasoned that "allegations of sexual abuse engender hesitancy in male officers and mistrust between inmates

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118. *Dothard*, 433 U.S. at 335.

119. The *Dothard* dissent acknowledged the victimizing impact of the majority's rationale:

> In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects. The effect of the decision . . . is to punish women because their very presence might provoke sexual assaults . . . . Once again, "[t]he pedestal upon which women have been placed has . . . , upon closer inspection, been revealed as a cage."

Dothard, 433 U.S. at 345 (Marshall, J., dissenting) (citing Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541 (Cal. 1971)).

120. Everson v. Mich. Dep't of Corr., 391 F.3d 737, 740 (6th Cir. 2004).

121. *Everson*, 391 F.3d at 747.

122. *Everson*, 391 F.3d at 755.

and guards, and thus the 'very manhood' of male [correctional officers] . . . undermines their capacity to provide security."[123] The court's holding stemmed from its sense that the history of male sexual aggression in MDOC prisons would create fear in the minds of vulnerable female inmates and thus diminish male staff members' ability to perform their jobs.[124]

C. The Failure to Prosecute Female Staff Perpetrators

The gender stereotype described earlier also influences the disciplinary actions taken against male and female staff perpetrators. Female staff face less prosecution than their male counterparts, and, if convicted, often receive lighter sentences.[125] Determining the exact types and percentages of punitive measures taken against female staff perpetrators (including arrest, referral for prosecution, transfer, and discharge) is a problematic task because the related statistics are intertwined with those available for male staff perpetrators.[126]

However, this trend is easy to identify in anecdotal evidence, as reported by newspapers across the country in the past few years. In Washington, a female staff member found guilty of having had sex with three male inmates received four years probation and a mere "scolding" from the judge.[127] Similarly, in Pennsylvania, a female corrections worker was simply sentenced to ten days in prison and probation after being

123. *Everson*, 391 F.3d at 755.

124. *Everson*, 391 F.3d at 741 (attributing its decision to "the problem of sexual abuse and other mistreatment of female inmates [that] has long plagued the MDOC").

125. *See Female Sex Offenders: Double Standard? Many Say They Don't Get Treated As Harshly As Men*, CBS NEWS, June 15, 2006, *available at* http://www.canadiancrc.com/articles/CBS_Female_Sex_Offenders_Double_Standard_15JUN06.htm (asking the question "are all sex offenders treated the same?" and considering whether female sex offenders are penalized as harshly as male sex offenders). Tony Rackauckas, the District Attorney of Orange County, California at the time this article was published, was quoted as saying, "[t]he reality is that they're just not going to be sentenced to the same kind of lengthy prison sentences that the men get." *Id.*

126. *See, e.g.*, BUREAU SEXUAL VIOLENCE, *supra* note 8, at 11 (providing data on the disciplinary measures taken against all staff perpetrators of sexual misconduct, without separating the data on the basis of gender).

127. Carrie Johnson, *Fired Guard Accepts Plea Deal in Sex Case*, ST. PETERSBURG TIMES (Fla.), July 18, 2002, at 1 (reporting that the judge added a scolding to the defendant's sentence). The judge reprimanded the defendant, saying: "Let me ask you a question, Ms. Barth, and you don't have to answer this . . . . What were you thinking? Were you thinking [the inmates] weren't going to run their mouths about their sexual goings-on with you?" *Id.*

convicted of sexually abusing a male inmate.[128] The judge in that case reported that "[i]f the incident had involved a male guard and a female inmate, . . . the sentence would have included months in jail."[129] In one Wisconsin case involving a female staff member engaging in sexual misconduct with a male inmate, the staff member received only two years probation and $1000 fine for two misdemeanor charges—violating prison rules and obstructing police. The court then withheld conviction on the second-degree criminal sexual assault charge, which will be dismissed altogether if the female staff member "complete[s] her probation without any significant rules violations or new crimes."[130] And in another Wisconsin case, a prison warden waited four months before reporting male inmates' allegations of sexual misconduct by two female corrections officers.[131]

Conversely, in New York, a male staff member convicted of raping two female inmates received eight years in prison and is awaiting further sentencing for other related counts.[132] Upon release, he is required to serve an additional three years of probation and must register on the New York Sex Offender Registry.[133] In Tennessee, a male corrections worker charged with rape and official misconduct faces "up to 30 years for the rape charge and up to six years for misconduct" if convicted.[134] And in New Hampshire, a male staff member is currently serving a ten- to twenty- year prison sentence for his convictions of rape, sexual assault, and simple assault against a female inmate.[135] Although anecdotal, these news stories paint an accurate picture of the fervent prosecution of male staff perpetrators and relatively half-hearted prosecution of female staff perpetrators.

The gender stereotype is a central contributing factor to this discrepancy in the correctional response to staff-on-inmate sexual misconduct. As described earlier, male inmates are less likely than female inmates to

128. J.C. North, *Prison Guard Gets 10 Days for Sex Charge*, PUB. OPINION (Chambersburg, Pa.), Nov. 16, 2000, at 3A.

129. *Id.*

130. Ed Treleven, *Probation and Fine for Sex with Inmate*, WIS. ST. J., Sept. 19, 2006, at C1.

131. Lisa Schuetz, *Oakhill Prison's Handling of Problem Probed: Warden Is Said to Have Waited Months to Report Allegations That Two Female Officers Had Sexual Contact with Male Inmates*, WIS. ST. J., April 4, 2006, at A1.

132. Bob Gardinier, *Former Guard Sentenced to 8 Years: David Rohrmiller Pleaded Guilty to Charges Relating to Rapes of Inmates*, TIMES UNION (Albany, N.Y.), Nov. 9, 2006, at B7.

133. *Id.*

134. *Southeast Tennessee*, CHATTANOOGA TIMES FREE PRESS, March 2, 2006, at B1.

135. Nancy Meersman, *Ex-Prison Guard Can Appeal Rape Conviction*, UNION LEADER (Manchester, N.H.), May 25, 2005, at A10.

report sexual abuse, particularly abuse committed by female staff, out of a desire to maintain their masculine image.[136] Additionally, the ingrained nature of the gender stereotype can, in some cases, prohibit these men from even identifying their experiences as abusive at the time they occur.[137] At the same time, male inmates who do recognize their experiences as abusive often hesitate to report out of fears of being doubted or mocked.[138] Moreover, because the gender stereotype paints women as passive victims, women often become "nearly invisible as sexual criminal[s]" to the criminal justice system.[139] As a result, only women involved in very serious sexual abuse cases are likely to be charged and convicted.[140] "For all these reasons—real and imagined—female sex offending is likely to go unrecognized, undiscovered and unreported."[141]

III. Rethinking the Gender Stereotype

In light of the Bureau's new data revealing the prevalence of female staff perpetrators, the criminal justice system's leniency in prosecuting female staff is clearly deficient. "To continue to pretend that women are not capable of seducing or manipulating [men] to have sex, or to conclude that women who behave this way are too rare to merit attention, will enslave us to the unfortunate habits and stereotypes of the past . . . ."[142] The criminal justice system must actively question the gender stereotype that lies at the heart of the current legal response to staff sexual misconduct, and develop a new standard for the prosecution of all staff perpetrators. To construct the basis for such a standard, one must first look to and learn lessons from the legal system's treatment of female perpetrators of statutory rape outside of the prison context.

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136. *See supra* note 25 (assessing the societal forces at work in perpetuating the gender order both inside and outside of prison).

137. Levine, *supra* note 25, at 385 (discussing how men are just as constrained as women by gender stereotypes and societal expectations when involved in sexually abusive situations).

138. *Id.*; *see* Fuchs, *supra* note 25, at 94–96 (explaining how society ridicules men who come forward to report assaults performed by women, particularly when the male victim admits to having maintained an erection during his sexual assault, and further arguing that an erection under these circumstances should not be read as an indication of consent to engage in sexual activity).

139. Levine, *supra* note 25, at 384.

140. *See id.* at 383 (contending that the extent of female perpetrated sexual abuse is "potentially far more prevalent" than any statistics indicate).

141. *Id.* at 388.

142. *Id.* at 359.

A. Learning Lessons from the Courts' Treatment of Female Perpetrators of Statutory Rape

The traditional legal approach to statutory rape, much like the traditional approach to prison rape, generally failed to account for the possibility that boys and men may become the victims of female rapists. Instead, most historical state statutory rape laws and court decisions on the issue reflected the pervasive gender stereotype that rape is a "masculine crime."[143] In particular, the gender stereotype was evident in the development and interpretation of state statutory rape laws that defined statutory rape as non-consensual sexual intercourse with a female.[144] The courts often interpreted these statutes as reflecting the physiological reality that only a male actor could force penetration,[145] and therefore a woman could not rape a man. Consequently, the historical statutes and case law in this regard mainly served to protect young girls and women, and to ignore male victims.[146]

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143. Brooks v. State, 330 A.2d 670, 672 (Md. Ct. Spec. App. 1975) (denying appellant's equal protection challenge to Maryland's gender-specific rape statute on the basis that rape must necessarily be defined as a "masculine crime" in order to protect vulnerable women). "The equality of the sexes expresses a societal goal, not a physical metamorphosis. It would be anomalous indeed if our aspirations toward the ideal of equality under the law caused us to overlook our disparate human vulnerabilities." *Brooks*, 330 A.2d at 672.

144. *See, e.g.*, GA. CODE ANN. § 26-2018 (1972) (specifying, in relevant part: "A person commits statutory rape when he engages in sexual intercourse with any female under the age of 14 years, not his spouse"); MINN. STAT. § 609.291 (1974) (providing, in relevant part: "Whoever has sexual intercourse with a female person, not his wife, without that person's consent and under any of the following circumstances, commits aggravated rape and may be sentenced to imprisonment for not more than 30 years"). The second-wave feminist movement that emerged in the 1970s worked hard to transform every gender-specific rape statute in the United States into a gender-neutral rape statute, and by the year 2000 they had attained that goal. *See* CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 22 (2004) ("The laws now read that 'any person' who has sex with 'any person' under the age of consent has committed a criminal act.").

145. *See* Fuchs, *supra* note 25, at 110 ("Several state courts have gone as far as state that it is physiologically impossible for a man to be raped."). *See, e.g.*, Green v. State, 270 So. 2d 695 (Miss. 1972) (upholding the constitutionality of a gender-specific "Peeping Tom" statute by comparing it to other gender-specific statutes like the state's rape statute, for which it provides a rationale: "One of the elements of rape is penetration, . . . therefore, the crime of rape can only be committed by a male").

146. *See, e.g.*, Hall v. State, 365 So. 2d 1249, 1253 (Ala. Crim. App. 1978) ("The State has a vital interest in the protection of young girls from the animalistic instincts of such men. It is the declared public policy of this State and in no wise runs afoul of the Equal Protection Clause of the Fourteenth Amendment, or any other constitutional provision."); *see* Levit, *supra* note 24, at 94 (exposing and analyzing the

In the 1970s, the circuit courts debated the issue of whether gender-specific rape statutes should be expanded to cover both male and female victims under the Equal Protection Clause of the Fourteenth Amendment.[147] In 1981, the Supreme Court responded to this circuit split with its decision in *Michael M. v. Superior Court of Sonoma County*.[148] In this case, a minor male defendant accused of raping a minor female challenged California's statutory rape statute for unlawfully discriminating on the basis of gender.[149] The statute defined statutory rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years," and, as a result, only imposed criminal sanctions on the male actor.[150] The State argued that its underlying objective in making a gender-based classification in the statute was to prevent teenage pregnancies. The Court upheld this objective as justified because women's ability to become pregnant is, in and of itself, "a significant deterrent for unwed young females."[151] Men, on the other hand, are not deterred in the same way and thus require statutory deterrence.[152]

In the years after the Supreme Court decided *Michael M.*, many state courts continued to uphold the constitutionality of gender-specific rape statutes.[153] At the same time, multiple state courts also departed from the Supreme Court's holding by reinterpreting gender-specific statutes as gender-neutral, thereby protecting the rights of both male and female victims from sexual abuse. Three of the most well-known of these non-conforming decisions are *Ex parte Richard Groves*,[154] decided

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perpetuation of the stereotype of male sexual aggression in the Supreme Court's decision in *Michael M. v. Super. Ct. of Sonoma County*, which "fosters the belief that this aggression is biologically based").

147. *See* Fuchs, *supra* note 25, at 108–110 (examining some cases on either side of the circuit split).

148. 450 U.S. 464 (1981).

149. *Michael M.*, 450 U.S. at 466.

150. *Michael M.*, 450 U.S. at 466.

151. *Michael M.*, 450 U.S. at 480 (Stewart, J., concurring). This ruling received criticism "for the way it stereotyped masculinity and male sexual violence." Fuchs, *supra* note 25, at 108.

152. *Michael M.*, 450 U.S. at 480 (Stewart, J., concurring).

153. *See, e.g.*, Baynes v. State, 423 So. 2d 307 (Ala. 1982) (finding that the gender-specific rape statute does not violate the Equal Protection Clause when the gender-based classification is reasonable and has a "fair and substantial relationship" with an interest of the state legislature, such as the protection of young girls from pregnancy); State v. LaMere, 655 P.2d 46, 50 (Idaho 1982) (upholding the constitutionality of the gender-specific rape statute because it serves the important governmental objective of preventing illegitimate teenage pregnancies).

154. 571 S.W. 2d 888 (Tex. Crim. App. 1978).

by the Court of Criminal Appeals of Texas in 1978, *People v. Liberta*,[155] decided by the Court of Appeals of New York in 1984, and *Maine v. Stevens*,[156] decided by the Supreme Judicial Court of Maine in 1986.

In *Ex parte Richard Groves*, a male defendant challenged a Texas statutory rape law on the basis that it unlawfully discriminated against men.[157] The statute made it a felony to engage in sexual intercourse with a female under the age of seventeen other than one's wife, and defined sexual intercourse as "any penetration of the female sex organ by the male sex organ."[158] The court determined that the legislature intended to protect the rights of both male and female victims of rape.[159] Accordingly, the court held that "although the male sex organ must penetrate the female sex organ in order for sexual intercourse to occur, such penetration may be initiated and that result caused by action of the female as well as the male."[160] Thus, the court reinterpreted the statute to include female perpetrators and male victims.

In *People v. Liberta*, a male defendant challenged New York Penal Law Section 130.35, which defined rape in the first degree as sexual intercourse with a female by "forcible compulsion."[161] In considering the exemption for females inherent in this statute, the court held that the government's purpose in using a gender-based classification was not justified.[162] Furthermore, the court refused to base its holding in the notion that female rape victims face problems unique to their gender, calling it "archaic and overbroad generalization which is evidently grounded in long-standing stereotypical notions of the differences between the sexes."[163]

Finally, in *Maine v. Stevens*, a female defendant charged with the rape of a thirteen-year-old boy argued that the definition of sexual intercourse in the state statutory rape law implicated a male actor and female victim and therefore could not be applied to her case.[164] The statute defined statutory rape as sexual intercourse with any person under the age of fourteen other than one's spouse, and defined "sexual intercourse" as "any penetration of the female sex organ by the male sex organ."[165] The

155. 474 N.E. 2d 567 (N.Y. 1984).
156. 510 A.2d 1070 (Me. 1986).
157. *Groves*, 571 S.W. 2d at 889.
158. *Groves*, 571 S.W. 2d at 889.
159. *Groves*, 571 S.W. 2d at 892.
160. *Groves*, 571 S.W. 2d at 892–93.
161. *Liberta*, 474 N.E. 2d at 577.
162. *Liberta*, 474 N.E. 2d at 573.
163. *Liberta*, 474 N.E. 2d at 573.
164. *Stevens*, 510 A.2d at 1071.
165. *Stevens*, 510 A.2d at 1071.

court interpreted the statute as gender-neutral and therefore as encompassing victims and perpetrators of both sexes.[166] The court explained that although the statute's definition of sexual intercourse "reflects the biological reality" that sexual intercourse involves penetration of the female sex organ by the male sex organ, that definition does not limit the identity of perpetrators of statutory rape to men.[167]

As these cases demonstrate, the criminal justice system has gradually become more willing to recognize male victims and female perpetrators of statutory rape, and to thereby move beyond the gender stereotype outside of the prison context. The courts are justified for multiple reasons in turning to statutory rape law for guidance and inspiration in the development of a new standard to apply to perpetrators of staff sexual misconduct in prisons. First, there is more jurisprudence in the area of statutory rape, for the courts have thoroughly considered the gender issues underlying these laws during the last twenty-five years.[168] Second, the statutory rape scenario is in many ways parallel to the prison sexual violence scenario. For instance, in both situations, consent is generally not a legal defense. Under statutory rape laws, minors are legally unable to consent.[169] Similarly, under twenty-three staff-on-inmate sexual abuse statutes, as described earlier, consent is not a defense.[170] Finally, the same gender stereotype is historically situated at the root of the legal response to both issues, lending itself to a delayed, yet growing, official recognition that female perpetrators can victimize boys and men.[171]

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166. *Stevens*, 510 A.2d at 1071.

167. *Stevens*, 510 A.2d at 1071 n.2.

168. *See* COCCA, *supra* note 144, at 67 (considering the extensive "judicial attention" that has been paid to the gender-specific language in statutory rape laws from the 1970s to the present).

169. *See, e.g.*, CAL. PENAL CODE § 261.5(a) (2007) (defining the age of valid consent for sexual intercourse as eighteen, unless the minor is married to the defendant); KAN. STAT. ANN. § 21-3502 (2005) (criminalizing sexual intercourse with minors under the age of fourteen); OR. REV. STAT. § 163.315 (2003) (characterizing people under the age of eighteen as incapable of validly consenting to sexual acts). *See generally* THE LEWIN GROUP, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS (2004), *available at* http://opa.osophs.dhhs.gov/titlex/statutory%20rape_state%20laws_lewin.pdf (summarizing the state statutory rape laws in the United States in 2004).

170. *See supra* Part I.A. (outlining the components of state statutory laws criminalizing staff sexual misconduct).

171. *See* Susanne V. Paczensky, *The Wall of Silence: Prison Rape and Feminist Politics*, *in* PRISON MASCULINITIES 133, 135–36 (Don Sabo et al. eds., 2001) (viewing the growing acceptance of male victims of child abuse as only the first step: "The next step will have to include adult males and their victimization"); Ken Tennen, *Wake Up, Maggie: Gender Neutral Statutory Rape Laws, Third-Party Infant-Blood Extraction, and the Conclusive Presumption of Legitimacy*, 18 J. JUV. L. 1, 1 (1997) (describing the

B. The New Standard

Taking into account the alternative perspectives and language from the three cases above, this Article proposes a new standard to prosecute both female and male staff perpetrators of prison rape. Already, many jurisdictions are beginning to expand and improve their "comprehensive strategies for preventing and responding appropriately to [staff] sexual misconduct."[172] These strategies include passing more stringent laws that exclude consent as a defense, implementing new agency policies to prevent and respond to staff sexual misconduct, and instituting training programs to spread both staff and inmate awareness of the problem.[173] However, the legal system must continue to improve its response to staff sexual misconduct.

Above all, the legal system must actively question the gender stereotype motivating current responses to staff sexual misconduct in prisons. The gender-neutral transition that has occurred in the statutory rape context must occur in the staff sexual misconduct context. As described above, the legal system initially failed to account for the existence of male victims and female perpetrators of statutory rape. However, it gradually realized the inaccuracy inherent in this approach.[174] Likewise, the legal system must acknowledge the presence of male inmate victims and female staff perpetrators of sexual misconduct in prisons, and generate a more gender-neutral framework with which to prosecute all staff sexual misconduct. The gender-neutral language in state and federal criminal statutes regarding staff sexual misconduct is not enough. These laws must be applied consistently to male and female perpetrators.[175]

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growing official recognition of both female sex offenders and male victims in the statutory rape context).

172. SEXUAL MISCONDUCT IN PRISONS, *supra* note 38, at 1 (praising the progress made in the late 1990s in recognizing the magnitude of sexual misconduct in prisons and the resulting efforts taken by many jurisdictions to combat it). For example, the Virginia Department of Corrections (DOC) developed a pamphlet on staff sexual misconduct to give to inmates when they first arrive. *Id.* at 10. The California DOC presented draft legislation to the state legislature proposing enhanced penalties for staff sexual misconduct. *Id.* at 4. And the Alaska DOC hired new staff members "dedicated to review, advice, and investigation of all incidents involving staff misconduct." *Id.* at 7. Several other jurisdictions have taken similar steps. *Id.* at 7–10.

173. *See id.*

174. *See supra* Part III.A. (delineating the historical shifts in the courts' approach to male and female perpetrators of statutory rape).

175. *See, e.g.*, *supra* Part II.C. (providing some evidence of the disparate prosecution and sentencing of female and male perpetrators of staff sexual misconduct under otherwise gender-neutral criminal statutes).

Generating a truly gender-neutral approach first requires the active prosecution of all those accused of staff sexual misconduct, regardless of gender.[176] Improving reporting systems in correctional facilities will allow all inmate victims to easily and safely voice their experiences of prison sexual violence.[177] This will bring to light more situations that warrant prosecution. Another method of promoting prosecution is to universally eliminate consent as a legal defense to these prosecutions. Interactions between prison staff and inmates are so laden with unequal power dynamics that any attempts to distinguish between freely given consent and coerced consent (either direct or indirect) prove futile and detract from prosecutorial efforts.[178]

Second, law enforcement must impose enhanced penalties on all those convicted of staff sexual misconduct, regardless of gender. It is unacceptable that three states and the federal government continue to define some forms of staff sexual misconduct as misdemeanor crimes.[179] Lawmakers should consider acts of staff sexual misconduct to constitute felonies that can carry penalties including incarceration, heavy fines, loss of license, and registration in the state Sex Offender database.[180] Enhanced penalties in all state and federal statutes would not only be appropriate punishments for the crime, but would also provide necessary deterrence to both female and male staff members.[181] The OIG report released in April 2005 emphasizes the persistent need for

176. *See* ALL TOO FAMILIAR, *supra* note 77 ("In Human Rights Watch's view, any correctional employee who engages in sexual intercourse or sexual touching with a prisoner is guilty of a crime and should be prosecuted to the fullest extent of the law.").

177. *See* STAFF PERSPECTIVES, *supra* note 7, at 21 (gathering recommendations from focus groups comprised of prison officials in order to "improve the correctional response to sexual violence"); Martin F. Horn, Testimony (Question and Answer) at the National Prison Rape Elimination Commission Hearing: Elimination of Prison Rape: The Corrections Perspective (Mar. 23, 2006), *available at* http://www.nprec.us/proceedings_miami.htm (calling for the implementation of additional reporting mechanisms for inmates, including confidential outlets).

178. *See supra* notes 17–20 and accompanying text (reflecting on the complex power struggles between staff and inmates that can come into play in their sexual encounters).

179. *See supra* notes 33–35 (outlining the state and federal statutory penalties for staff sexual misconduct).

180. *See Correctional and Juvenile Facilities—Contact with Inmates and Juveniles—Penalties: Hearing on H.B. 456 Before the H. Judicial Proceedings Comm.*, 421st Gen. Ass., Reg. Sess., at 4 (Md. 2006) (testimony of Brenda V. Smith) (on file with the American University Law Review) [hereinafter Smith Testimony] (urging the Committee to strengthen the criminal penalties in Maryland for staff sexual misconduct from misdemeanor to felony penalties).

181. *See* DETERRING STAFF SEXUAL ABUSE, *supra* note 20, at 11 ("While administrative actions, including termination, may seem substantial, these punishment often do not provide sufficient deterrence to staff sexual abuse of inmates.").

strengthened deterrence efforts in light of the fact that "prison staff who sexually abuse inmates often do not believe that they will be caught, and if they are caught do not believe they will be punished."[182] Studies show that prosecutors are more interested in prosecuting sexual abuse cases when the charged crimes are felonies.[183] Thus, increasing penalties for staff sexual misconduct, along with active prosecution of all offenders, will better protect inmate victims and deter future staff sexual misconduct.

CONCLUSION

In order to detect, prevent, reduce, and punish prison rape, and to protect inmates' constitutional rights,[184] the legal system must acknowledge that female staff can and do perpetrate sexual misconduct in prisons. Applying the new standard that this Article proposes will be a sizable step in that direction. This standard consists of the active prosecution of both male and female staff for sexual misconduct and the imposition of harsher penalties on all those convicted.

This standard will dissolve the stereotype regarding male perpetrators and female victims by recognizing the existence of female staff perpetrators and prosecuting them just as harshly as male staff perpetrators. In addition, by adding to deterrence efforts, the standard will reduce the overall incidence of staff-on-inmate sexual misconduct. The standard will also assist in breaking down the code of silence in prisons by normalizing male victims' experiences. As a result, reporting on such misconduct will increase, and the reliability of data on the numbers and identities of victims and perpetrators will improve.[185]

Conversely, failure by lawmakers and the courts to adequately respond to staff sexual misconduct will have severe consequences for inmates and the prison system in general. Allowing staff sexual

182. *Id.* at 11–12. Some state prisons and correctional agencies have made their own efforts to implement deterrence programs and spread awareness about the detrimental effects of staff sexual misconduct. *See* SEXUAL MISCONDUCT IN PRISONS, *supra* note 38, at 1 (describing state-wide initiatives, such as policy seminars, training workshops, and research, to reduce sexual misconduct between staff and inmates); Wake, *supra* note 41, at 220 (describing the training program for staff instituted by the NIC to address staff-on-inmate sexual abuse).

183. DETERRING STAFF SEXUAL ABUSE, *supra* note 20, at 1; *see* Smith Testimony, *supra* note 180, at 4–5 (emphasizing that enhanced penalties for staff sexual misconduct will encourage prosecution efforts).

184. *See* 42 U.S.C. § 15602 (Supp. IV 2004) (listing the PREA's core goals).

185. *See supra* notes 21–25 and accompanying text (weighing the causes and effects of the prison code of silence on the reliability of reporting).

misconduct to persist behind prison walls can, for instance, jeopardize prison security,[186] create an environment lacking in "mutual respect" between staff and inmates,[187] endanger the public health,[188] and violate inmates' constitutional rights. "As a society, we have chosen incarceration as a primary tool to deal with antisocial behavior. Having made this choice, we are legally and morally responsible for protecting those who become wards of the state."[189]

186. *See* Elizabeth Layman et. al., The Center for Innovative Public Policies, *Exploding the Myths about Staff Sexual Misconduct with Inmates: Risk Assessment, Prevention and Investigation*, http://www.cipp.org/sexual/jailsex.html (outlining the harmful impacts of staff sexual misconduct on correctional organizations).

187. COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 66 (2006) (encouraging prison officials to create a "culture of mutual respect" in their prisons in order to maintain security and control over inmates, and thereby reduce prison violence).

188. *See generally* Christopher P. Krebs, *High-Risk HIV Transmission Behavior in Prison and the Prison Subculture*, 82 PRISON J. 19 (2002); Esteban Parra & Lee Williams, *AIDS Epidemic Raging Behind Bars: Newark AIDS Specialist Calls Care of Inmates 'A Disgrace'*, DEL. ONLINE, Sept. 26, 2005, http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20050926/NEWS/509260347/1006&theme=PRISONDEATHS (describing the severe problem of the spread of AIDS in prisons, which can extend to the outside community when prisoners are released).

189. Julie Samia Mair et al., *National Challenges in Population Health: New Hope for Victims of Prison Sexual Assault*, 31 J.L. MED & ETHICS 602, 605 (2003).